

STATE OF VERMONT
HUMAN SERVICES BOARD

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| In re |) | Fair Hearing No. 15,078 |
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| Appeal of |) | |
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INTRODUCTION

The petitioner has filed a Motion for the Board to reverse a decision by the Department of Aging and Disabilities (DAD) substantiating a report of abuse by the petitioner against a disabled adult, and for the Board to order that all DAD records in the matter be destroyed. The issues are whether the Board presently has jurisdiction in the matter and, if so, whether the decision by DAD should be reversed.

PROCEDURAL HISTORY

On June 24, 1997, DAD notified the petitioner, pursuant to 33 V.S.A. § 6906(c), that it had substantiated a report of abuse by the petitioner of L.B., a mentally disabled adult. On July 8, 1997, the petitioner, pursuant to 33 V.S.A. § 6906(d), filed an appeal of this decision with the Human Services Board.

On August 27, 1997, the hearing officer conducted a status conference, at which time the parties agreed, inter alia, to file prehearing memoranda regarding the legal validity of evidence introduced through "facilitated communication" (FC). DAD and the petitioner submitted their

written arguments, and accompanying documents, on October 14 and 20, 1997, respectively. The petitioner filed a written response on November 18, 1997, and DAD filed its written response on November 24, 1997.

In his written submissions the petitioner moved that the hearing officer either exclude the admission of any evidence obtained through the use of FC or, in the alternative, hold a preliminary hearing to determine whether FC is admissible as "expert testimony".

In a Memorandum dated December 8, 1997, the hearing officer denied the petitioner's Motions and instructed the parties to prepare for a hearing on the merits.

On December 15, 1997, the petitioner filed a request for a preliminary hearing to determine the competency of L.B., the alleged victim, to testify using FC. DAD filed its opposition to this request on December 23, 1997.

On January 27, 1998, the hearing officer scheduled a status conference for February 18, 1998. Following a continuance agreed upon by the parties, this conference was held by phone on February 24, 1998. At that time the hearing officer ruled, inter alia, that because of the potential intimidation and distraction of L.B., the petitioner could not videotape the hearing.

On March 4, 1998, the petitioner filed a Motion for the hearing officer to reconsider allowing the videotaping of the hearing. In a Memorandum dated March 9, 1998, the

hearing officer reiterated his ruling against videotaping and set the matter for hearing on March 19, 1998. The parties subsequently agreed to continue the hearing until April 6, 1998.

The hearing on April 6, 1998, commenced with a demonstration of L.B. using FC with a "facilitator" with whom he was familiar. After about one hour of highly problematic communications of L.B. through FC, the hearing officer continued the hearing with instructions to the parties to try to come to an agreement as to the circumstances under which the testimony of L.B. could be elicited. A status conference was subsequently scheduled for May 19, 1998.

At the status conference on May 19, the parties agreed to a format whereby L.B.'s ability to testify through FC would be "tested" immediately in advance of his testimony, and they agreed to conduct that test and take his testimony using a specially designed room to minimize distractions and intimidation. It was further agreed that DAD would call L.B. as its last witness and that the testimony of the DAD's other witnesses would proceed on May 28, 1998.

At the hearing on May 28, 1998, the hearing officer excluded the hearsay testimony of witnesses other than L.B. pending a ruling on the ability of L.B. to communicate through FC. Extensive testimony as to L.B.'s level of functioning and his ability to communicate was presented by

L.B.'s therapist and his community mental health case manager, to whom L.B., using F.C., had allegedly reported the alleged abuse. No admissible evidence was introduced regarding the alleged abuse of L.B. by the petitioner.

On June 1, 1998, DAD informed the Board and the petitioner that it had decided to "withdraw" the matter and not proceed with its case against the petitioner, and that no further hearing would be necessary.

On June 2, 1998, the petitioner filed a Motion for the Board to reverse the decision substantiating abuse against the petitioner and to order DAD to destroy its records and information relating to the petitioner. DAD filed a written Opposition to this motion on June 11, 1998, and the petitioner filed a written response on June 17, 1998. On July 31, 1998, the hearing officer sent a memorandum to the parties requesting that DAD clarify its position in the matter. On September 1, 1998, the petitioner filed a request for an "immediate" decision from the Board with the Board's Chairman. DAD filed its response to the hearing officer's request on September 3, 1998.

ORDER

The decision by DAD is reversed and the report of abuse is found to be unsubstantiated.

REASONS

As a general matter, the Board's jurisdiction is set forth in 3 V.S.A. § 3091(a):

An applicant for or a recipient of assistance, benefits or social services from the department of social and rehabilitation services, the department of social welfare, the office of economic opportunity, the department of aging and disabilities, the office of child support, or an applicant for a license from one of those departments or offices, or a licensee, may file a request for a fair hearing with the human services board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits or services is denied, or is not acted upon with reasonable promptness, or because the individual is aggrieved by any other agency action affecting his or her receipt of assistance, benefits or services, or license or license application, or because the individual is aggrieved by agency policy as it affects his or her situation.

The petitioner is clearly not an applicant for or a recipient of assistance, benefits, services, or a license from DAD. Therefore the Board has no general jurisdiction under its statute to address a grievance against DAD that does not arise from this status.

Instead, jurisdiction is obtained in these cases by a specific reference in the statutes governing DAD investigations of abuse against elderly and disabled adults.

33 V.S.A. § 6906 provides as follows:

(a) The commissioner shall cause an investigation to commence within 48 hours after receipt of a report made pursuant to section 6904 of this title.

(b) The investigation shall include, except where inclusion would jeopardize the health, welfare, or safety of the elderly or disabled adult:

(1) a visit to the reported victim's place of residence or place of custody and to the location of the reported abuse, neglect or exploitation:

(2) interviews with any available witnesses to the alleged abuse, neglect or exploitation:

(3) an interview with the reporter of the alleged abuse, neglect or exploitation:

(4) an interview with the reported victim, which interview may take place without the approval of the elderly or disabled adult's parents, guardian or caregiver; but cannot take place over the objection of the reported victim;

(5) an opportunity for the person who allegedly abused, neglected or exploited to be interviewed.

(c) Upon completion of the investigation, a written report describing all evidence obtained and recommending a finding of substantiated or unsubstantiated shall be submitted to the commissioner or designee for final resolution. If the recommendation is for a finding of substantiated the person shall be given notice of the recommendation, and the evidence which forms the basis of the recommendation, and shall be notified of how a substantiated report might be used. The person shall be offered an opportunity to dispute the recommendation and may, within 15 days of notification, request an administrative hearing in front of the commissioner or designee. Following the hearing, or if no hearing is requested within 15 days of notification the commissioner or designee shall make a finding of substantiated or unsubstantiated, and notify the person of the decision and of the right to appeal.

(d) A person may, within 30 days of notification that a report has been substantiated, apply to the human services board for relief on the grounds that it is unsubstantiated. The board shall hold a fair hearing under section 3091 of Title 3.

(e) If a report is found to be unsubstantiated, the records shall be destroyed within 90 days after notice to the person complained about unless the person requests that the records not be destroyed. If no court proceeding is brought pursuant to subdivision 6903(c)(3) of this title within one year of the date of the notice to the person complained about, the records relating to the unsubstantiated report shall be

destroyed.

(f) If an appeal is filed pursuant to section 6906(d) of this title or to a court, the name of the individual shall not be added to the registry until a finding of substantiated becomes final.

(g) If the human services board or a court reverses a finding of substantiated, the commissioner shall remove all information relating to that finding in accordance with subsection (e) of this section.

As noted above, DAD originally notified the petitioner that it had "substantiated" a report of abuse by him against a disabled adult; and there is no question that the Board originally had jurisdiction under the above statute to hear the petitioner's appeal of that decision. However, during the pendency of that appeal, DAD notified the Board and the petitioner that it had "withdrawn the substantiated report" against the petitioner. DAD subsequently stated further that its withdrawal means that the above statute "no longer applies". The Board assumes this to mean that the report will not be placed in the "registry" of substantiated reports maintained by DAD¹--at least not until further notice.

However, DAD's position in this matter begs the question, raised by the hearing officer in his memorandum dated July 31, 1998, of whether DAD now considers the report "unsubstantiated". DAD has now made it clear to the Board that it has not determined that the report is

¹ See 33 V.S.A. § 6911.

unsubstantiated, and that it has no intention of doing so, which, in effect, leaves the final resolution of the case in limbo. Understandably, the petitioner feels aggrieved by this status and takes issue vehemently with the lack of finality to the matter.

The Board concludes that by merely "withdrawing" its substantiation of abuse, without declaring the report "unsubstantiated", DAD is in violation of the clear requirement in section (c) of § 6906, supra, that there be "final resolution" by DAD of any report of abuse. As noted above, there is no question that the Board obtained jurisdiction in this case pursuant to § 6906(d), supra, when the petitioner appealed DAD's initial determination that the report was substantiated. It is held that unless and until DAD finds the report "unsubstantiated" the Board has continuing jurisdiction under the statute to render a "final resolution" of the matter in accordance with the statute.

As noted above, DAD has informed the petitioner and the Board that it no longer wishes to proceed with its case against the petitioner. There has been no evidence introduced to support the decision that the report is "substantiated". Inasmuch as the burden of proof in these matters is on the agency, it must, therefore, be concluded that the report is "unsubstantiated". The decision by DAD is reversed, and the Department shall remove and destroy all information relating to the report in accordance with §§

6906(e) and (g), supra.

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